Supreme Court of the United States

OCTOBER TERM, 1944

NO.————

GREAT AMERICAN INDEMNITY COMPANY,
Petitioner,

versus

LYMAN FLENIKEN, ET AL,
Respondents.

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

STATEMENT

This is an application for a writ of *certiorari* to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit reversing a judgment of the United States District Court for the Eastern District of Louisiana.

The material facts and the questions involved are set forth in the foregoing petition. The assignments of error there set forth are here adopted as a part of this brief.

THE DECISION BELOW

The opinion of the Circuit Court of Appeals (R. 42) is reported in 142 F. 2d 938.

STATEMENT OF JURISDICTION

The statement of jurisdiction set forth in the foregoing petition is here adopted as a part of this brief.

QUESTION PRESENTED

The question for decision is whether respondents were entitled to notice and an opportunity to be heard upon the matter of entering judgment on the mandate; in other words, whether it was the ministerial duty of the District Judge, after receiving the mandate, to grant the motion of the petitioner for a directed verdict and enter judgment without notice to the respondents.

CONTENTIONS OF PETITIONER

When the Circuit Court of Appeals held in the cause entitled "*Great American Indemnity Company, Appellant, vs. Lyman Fleniken, et al., Appellees*" No. 10,247 on its docket (R. 5) that the motion of Great American Indemnity Company for a directed verdict at the close of all the evidence was well founded and "the motion of defendant appellant for a verdict in its favor should have been granted. The judgment is reversed and the cause is remanded for further and not inconsistent proceedings." (R. 13), and issued its mandate on February 1, 1943 directing that the judgment of the District Court be and the same is reversed and that this cause be and is remanded to the District Court for further and not inconsistent proceedings (R. 4), the District Judge had no alternative but to render judgment granting the motion of defendant (petitioner) for a directed verdict. A motion, therefore, was unnecessary—the Judge should have entered judgment on his own motion.

The rule is stated thus in *Cyclopedia of Federal Procedure*, 2nd Edition Vol. 12, Section 6399:

"The further proceeding in the lower court on remand, ordinarily to be had on appropriate notice and motion, are controlled by the mandate, **which fixes the measure and limitations of the lower court's powers and discretion and imposes an obligation on that Court to do nothing contrary to its letter or spirit, as elucidated and explained by the opinion."** (Emphasis ours.)

We also quote from 3 *Am. Jur.*, Secs. 1236 and 1237, p. 732 et seq:

"Sec. 1236. Judgment in Conformity to Mandate:—

The lower court, upon remand of a case from a higher court, must obey the mandate or remittitur; and render judgment in conformity thereto; it has no authority to enter any judgment not in conformity with the order, or any judgment other than that directed or permitted by the reviewing court. Otherwise litigation would never be ended, and the supreme tribunal of the state would be shorn of authority over inferior tribunals. This is particularly true when the mandate or remittitur orders the entry of a specific judgment or a particular decree. When the merits of a case are determined on appeal, the trial court has no power but to obey the judgment of the appellate court. **Whatever comes before and is decided and disposed of by the reviewing court is considered as finally settled, and the inferior court to which a mandate issues is bound by the decree as the law of the case and must carry it into execution according to the mandate, without granting a new trial or taking additional evidence, except, perhaps, in cases where, by statute, a party is entitled to a new trial as a matter of right. Nor can new defenses existing at the date of the decree or judgment be heard in opposition."**

* * *

"Sec. 1237. Alteration, Modification, Amendment, etc., by Trial Court of Mandate:—

After reviewing court has determined a case before it and remanded such case to the lower court, the latter is without power to modify, alter, amend, set aside, or in any manner disturb or depart from the judgment of the reviewing court, even during the continuance of the term in which it was rendered. The judgment of the higher court is not reviewable in any way by the court below, in the exercise of its equitable powers, or otherwise. **The lower court cannot vary or examine the decree of the higher court for any other purpose than execution; give any other or further relief; review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. It can only proceed to execute the mandate and settle so much as remains to be done without rescission or modification."** (Emphasis ours.)

The mandate "as elucidated and explained by the opinion," which was a part thereof, clearly instructed the District Judge to grant the petitioner's motion for a directed verdict, and he had no right to modify, amend or vary the judgment or depart from the appellate court's directions.

In the case of *Herzberg's Inc. v. Ocean Acc. & Guarantee Corporation*, 132 F. 2d 438 (C.C.A., 8th Cir., 1943) suit was brought by an insured against its insurer under a public liability policy. There was judgment in the District Court for plaintiff and the defendant appealed. There as here "The evidentiary facts were not in dispute and the only question for decision was whether the loss which plaintiff had sustained—which had been occasioned by the recovery of damages from it by a patron of its store for personal injuries caused by an electrical treat-

ment administered by a cosmetician in a beauty shop operated in the store—was excluded from the coverage of the policy by a malpractice endorsement." (In the case at bar "The evidence is without conflict" as found by the Circuit Court) (R.6). The District Court had ruled that the loss was not caused by malpractice within the meaning of the endorsement and had entered judgment in favor of the plaintiff with costs. The Circuit Court of Appeals held that the loss was excluded from the coverage of the policy by the malpractice endorsement. The concluding words in the opinion of the Circuit Court of Appeals are practically identical with the last sentence of the opinion of the Fifth Circuit Court in the case at bar. They are: "The judgment below is reversed and the cause remanded to the District Court for further proceedings not inconsistent herewith." (See 100 F. 2d 171, 173). Like the plaintiffs at bar, the plaintiff in that case applied to the Supreme Court of the United States for *certiorari*, but the application was denied. 306 U. S. 645, 59 S. Ct. 584, 83 L. Ed. 1044. The mandate of the Court of Appeals provided, in part, as follows:

> "' * * * it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the Ocean Accident and Guarantee Corporation, Inc., a corporation, have and recover against Herzberg's, Inc., a corporation, the sum of Three Hundred Twenty-six and 30/100 Dollars for its costs in this behalf expended and have execution therefor.
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> "'And it is further ordered by this Court that this cause be and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court this day filed herein.'"

After the mandate went down to the District Court, the plaintiff moved that court for leave to file an amended complaint and for a new trial. The court granted leave to amend. Of this action the Court of Appeals said:

> "(1,3) A majority of this Court thinks that, while the opinion and mandate on the former appeal of this case did not specifically direct the entry of judgment in favor of the defendant, the effect of the mandate, of which the opinion was a part (*Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. R. Co.*, 8 Cir., 106 F. 2d 891, 894), was to require that to be done, since every issue of law and fact raised by the pleadings had been decided, and nothing remained to be done except for the trial court to determine the costs that the defendant was entitled to recover and to enter judgment in favor of the defendant with costs. **The majority is of the opinion that the former decision of this Court terminated this case for all purposes; that thereafter the complaint was not subject to amendment without express leave from this Court** (compare, *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 8 Cir., 121 F. 2d 561); and that if the amendment of the complaint had any effect at all, it constituted the commencement of a new and independent action, which, at the time the amendment was made, was barred by the statute of limitations of the State of Nebraska. **The majority regards the amendment to the complaint and the proceedings subsequent thereto as an ineffectual attempt to circumvent a decision of this Court which was completely determinative of this case. This is not a case like *Northern Pacific Ry. Co. v. Van Dusen Harrington Co., D. C.*, 34 F. 2d 786, 787, or *Millers' Mut. Fire Ins. Ass'n. of Illinois v. Bell*, 8 Cir., 99 F. 2d 289, 291, in which, after a judgment of a trial court had been reversed by this Court, issues of fact remained open and a new trial was in order.**

"(4,5) In *Thornton v. Carter*, 8 Cir., 109 F. 2d 316, 319, we pointed out that 'There can be no question of the right of an appellate court of the United States when it reverses a case, to direct the entry of the proper judgment or decree in the lower court and thus terminate the litigation upon the merits, (1) in an equity case; (2) in a jury-waived case submitted upon an agreed statement of facts; and (3) in a jury-waived case in which the trial court's findings of fact are sustained by the evidence and are complete, but its conclusions of law and judgment are erroneous.' "

"We also said in that case (109 F. 2d at page 320): 'A mandate is completely controlling as to all matters within its compass, but on remand the trial court is free to pass upon any issue which was not expressly or impliedly disposed of on appeal. Since, however, a final judgment upon the merits concludes the parties as to all issues which were or could have been decided (*Guettel v. United States*, 8 Cir., 95 F. 2d 229, 230, 118 A.L.R. 1060 and cases cited), it is obvious that such a judgment of this court on appeal puts all such issues out of the reach of the trial court on the remand of the case. **That court is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of this court deciding the case.** See *Goldwyn Pictures Corp. v. Howells Sales Co.*, 2 Cir., 287 F. 100, 102.' " (Emphasis ours.)

It will be noted that the Circuit Court of Appeals for the Fifth Circuit in reversing the judgment in this case on the first hearing (R. 13) not only used substantially the same language used in the cited case but in addition used this clear and precise language:

> "The motion of defendant appellant for a verdict in its favor should have been granted."

Hence the instant case is much stronger for the petitioner than the cited case was for the defendant.

In the case of *Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. Ry. So., supra*, on the first appeal to the Circuit Court of Appeals, 8th Cir., 99 F. 2d 902, (1938) the Appellate Court issued a mandate reading "that the judgment of the said District Court in this cause, be, and the same is hereby reversed insofar as it relates to the liability and responsibility of the parties for damages to the defendant's two bridge piers resting on the east side of the middle of the Mississippi River, and in all other particulars the judgment is hereby affirmed". A second appeal to the Circuit Court of Appeals presented the single question as to whether the lower court entered judgment consistent with the opinion of the appellate court. In finding that the judgment appealed from had been entered in strict conformity with its mandate, the Circuit Court of Appeals said:

> "(1,2) It is the established rule of this court that following reversal with directions, proceedings in the lower court should conform to the mandate, of which the opinion is a part. *American Surety Co. v. Bankers' Savings & Loan Ass'n*, 8 Cir., 67 F. 2d 803; *Mortgage Loan Co. v. Livingston*, 8 Cir., 66 Fed. 2d 636; *H. P. Coffee Co. v. Reid, Murdoch & Co.*, 8 Cir., 60 F 2d 387. See, also: *Gulf Refining Co. vs. United States*, 269 U. S. 125, 46 S. Ct. 52, 70 L. Ed. 195; *City Nat. Bank v. Hunter*, 152 U. S. 512, 14 S. Ct. 675, 38 L. Ed 534; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 S. Ct. 291, 40 L. Ed. 414; *Metropolitan Water Co. v. Kaw Valley Drainage Dist.*, 223 U. S. 519, 32 S. Ct. 246, 56 L. Ed. 533. * * *
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> " * * * **The mandate of this court left nothing to the discretion of the lower court. It in effect**

performed a ministerial act in entering the judgment of this Court." (Emphasis ours.)

To support their contention that a new trial should have been granted under the mandate issued by the Court of Appeals for the Fifth Circuit, plaintiffs cited the following cases, viz: *Slocum vs New York Life Insurance Company*, 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879 (1913); *Shell Petroleum, Inc. vs. Shore*, 80 F. 2d 785 (C.C.A. 10th Cir., 1935); and *In re Aqua Systems, Inc.*, 90 F. 2d 538, decided by this Court in 1937. **All of these cases were decided before the adoption of the New Federal Rules and their holdings are no longer applicable,** for as stated in *Madden Furniture Co. vs. Metropolitan Life Insurance Co.*, 127 F. 2d 837, *supra*, the very purpose of Rule 50 (b) is to obviate the necessity for a new trial under circumstances as exist in the instant case. The latter case was also decided by the Court of Appeals for the Fifth Circuit and in it the Court pointed out that Rule 50 (b) of the Federal Rules of Civil Procedure was intended to obviate the necessity for a new trial whenever the trial judge finds that he has erroneously refused to direct a verdict. In the instant case the Fifth Circuit Court found that the District Judge erroneously refused to direct a verdict for the defendant at the conclusion of all the evidence. Hence, there is no necessity for a new trial.

The distinction between the case at bar and the *Madden Case* is that in the latter case it was specifically pointed out that the judgment of the District Court with reference to the motion for judgment *non obstante veredicto* was not considered, but the errors passed upon involved matters prior to the verdict, namely the exclusion of evidence that should have been admitted, and the judge's charge to the jury, and therefore a new trial ought to have been had. **Here, there was no question as to the court's ruling on ad-**

missibility of evidence, or as to the correctness of his charge to the jury. The refusal of the Trial Judge to grant the motion for a directed verdict and later his refusal to grant defendant's motion for a judgment *non obstante veredicto* was the very issue decided by the Court of Appeals and which held that "the motion of defendant appellant for a verdict in its favor should have been granted". There is no need for a new trial of the issues involved in plaintiffs' claim—they are closed.

There being no occasion for a new trial or amendment of pleadings, there was no necessity for notice before entry of judgment herein. It was so held in *Carter v. Thornton*, 109 F. 2d 316 (C.C.A., 8th Cir., 1940). That case involved a contest over the proceeds of a life insurance policy deposited in court by an insurer between the named beneficiary, Mrs. Wilma I. Carter, and the allegedly substituted beneficiary, John T. Thornton. The sole question presented by the appeal to the Circuit Court of Appeals, was whether a certain document effected a change of beneficiary, or was an assignment which the policy prohibited. The conclusion reached by the Appellate Court was that the instrument did not change the beneficiary, but was an attempt to transfer a security interest in the policy, which being in violation of the terms of the policy, could not be given effect as against the beneficiary. The judgment in the District Court had been for Thornton; Mrs. Carter had appealed. The opinion of the Circuit Court of Appeals provided:

> "The judgment appealed from is reversed and the case remanded with directions to enter a decree in favor of appellant."

Thornton applied for a rehearing which was denied. The mandate of the Court of Appeals went down and was received by the District Court on February 18, 1938.

No decree for Mrs. Carter was entered then. On September 19, 1938, the District Court granted leave to Thornton to file a supplemental answer which challenged the correctness of the decision of the Appellate Court and prayed for judgment notwithstanding its mandate. Mrs. Carter moved to dismiss this answer and an order dismissing the supplemental answer was entered on Feb. 9, 1939. On Feb. 14, 1939, Mrs. Carter moved for judgment on the mandate. She asked that the decree required by the mandate be entered, and for judgment against Thornton for the $123.20 which the Insurance Company had been allowed to withdraw from the fund deposited by it. She also asked for interest on the money withdrawn from the registry of the Court by Thornton. Thornton filed an answer to this motion, asserting, among other things, that Mrs. Carter was not entitled to any judgment. A judgment was entered on April 4, 1939, providing, among other things, that the $123.20 allowed the Insurance Company should be borne one-half by Thornton and one-half by Mrs. Carter; that Mrs. Carter should have judgment against Thornton for $2438.40 less certain credits, the amount to bear 6% per annum interest from February 9, 1939. Thornton appealed, contending that his supplemental answer should not have been dismissed, but should have been sustained and the court should have denied Mrs. Carter any decree.

In addition to what has already been quoted by the Court in *Herzberg's Inc. v. Ocean Acc. & Guarantee Corporation, supra*, the Court said on the second appeal (109 F. 2d 316, 319):

> "(2,3) When a case has been decided by this court on appeal and remanded to the District Court, every question which was before this court and disposed of by its decree is finally settled and determined. The District Court is bound by the decree and must carry it into execution accord-

ing to the mandate. It cannot alter it, examine it except for purposes of execution, or give any further or other relief or review it for apparent error with respect to any question decided on appeal, and can only enter a judgment or decree in strict compliance with the opinion and mandate."

In support of this principle the court cited the following cases:

Sibbald v. United States, 12 Pet. 488, 492, 9 L. Ed. 1167;
Clark v. Keith, 106, U. S. 464, 465, 1 S. Ct. 568, 27 L. Ed. 302;
In re Washington, etc. R. Co., 140 U. S. 91, 11 S. Ct. 673, 35 L. Ed. 339;
Gaines v. Rugg, 148 U. S. 228, 243, 13 S. Ct. 611 37 L. Ed. 432;
In re Sanford Fork & Tool Co., 160 U. S. 247, 255, 16 S. Ct. 291, 40 L. Ed. 414;
In re Potts, 166 U. S. 263, 267, 17 St. Ct. 520, 41 L. Ed. 994;
Illinois v. Illinois Central R. Co., 184 U. S. 77, 91, 92, 22 S. Ct. 300, 46 L. Ed. 440;
Ex parte Union Steamboat Co., 178 U. S. 317, 319, 20 S. Ct. 904, 44 L. Ed. 1084;
Kansas City Southern Ry. Co. vs Guardian Trust Co., 281 U. S. 1, 10, 11, 50 S. Ct. 194, 74 L. Ed. 659;
Sprague v. Ticonic National Bank, 307 U. S. 161, 168, 59 S. Ct. 777, 83 L. Ed. 1184.
Ruggles v. Buckley, 6 Cir., 192 F. 907, 909;
Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co., 6 Cir., 72 F. 545, 560;
D'Arcy v. Jackson Cushion Spring Co., 6 Cir., 212 F. 889, 891;
Williams v. Ansehl, 8 Cir., 279 F. 550, 551;
Mortgage Loan Co. v. Livingston, 8 Cir., 66 F. 2d 636, 640;
Flowers vs United States, 8 Cir., 86 F 2d 79, 80, 81;

Pocono Rubber Cloth Co. v. J. A. Livingston, Inc., 3 Cir. 82 F. 2d 290, 291;

Goldwyn Pictures Corp. v. Howells Sales Co., Inc., 2 Cir., 287 F. 100, 102.

The Court said further:

"(9-12) As we have already pointed out, Mrs. Carter, on February 18, 1938, was entitled to a decree which would give to her the same relief which was awarded to Thornton under the decree which had been reversed. The decree in favor of Thornton gave him the equivalent of $2,500 ($2,376.80 of the deposit, and $123.20 judgment against Mrs. Carter) and his costs. Therefore, if the court below had on February 18, 1938, entered a decree in favor of Mrs. Carter and against Thornton for $2,500 and her costs, it would have complied with the mandate of this court. This decree, however, was not entered. It is now apparent that Thornton has the fund which was deposited and has had it since the fall of 1936. Mrs. Carter contends that she ought to have interest on her money which Thornton has had from the time that he obtained it from the registry of the court. The matter of interest up to the time that the first appeal was ended was, we think, a question which could have been, and therefore should have been, presented to this court in connection with that appeal, and it is not a matter which can now be considered by the court below or by this court. The question of Mrs. Carter's right to interest upon the decree which should have been entered at the time the District Court received our mandate stands in a different situation. **Mrs. Carter was entitled to have the decree entered without any application or motion on her part. Our mandate required of the District Court the doing of a purely ministerial or clerical act.** *Pike Rapids Power Co. v. Minneapolis, St. Paul, etc. Ry. Co.*, 8 Cir., 106 F. 2d 891, 894. It was through

> no fault of Mrs. Carter that the decree was not entered on the day our mandate was received. We regard that as done which should have been done. It is our opinion that on February 18, 1938, by virtue of our mandate, Mrs. Carter became legally entitled to recover the fund which Thornton had withdrawn from the registry of the court and to have judgment against him for the $123.20 costs and expenses of the insurance company and for her costs, and that on that day he became legally obligated to restore the fund to her and to pay her, in addition, $123.20 and her costs. We hold that Mrs. Carter was entitled to six per cent interest on the amount which Thornton was obligated to pay her from February 18, 1938." (Emphasis ours.)

The Court of Appeals for the Fifth Circuit also held (R. 44) that when the case was remanded to the District Court with instructions that the motion for a directed verdict should have been maintained, this did not reinstate the motion of petitioner for a directed verdict and in the alternative for a new trial, which motion had been overruled before an appeal was taken, saying "It was within the discretion of the Court below to allow that motion to be renewed and to rule on it but this should not have been done without giving the parties a hearing. The plaintiff was entitled to present his objections to such procedure and to ask for a trial *de novo*." In support of this holding, the Court cited *Madden Furniture Company vs. Metropolitan Life Insurance Company*, 127 F. 2d 837, and *Roth vs. Hyer*, 142 F. 2d 227, both decided by the Fifth Circuit Court.

We submit that the decision in *Metropolitan Life Insurance Company vs. Madden Furniture Company, supra*, is not pertinent because the alleged errors occurred **prior** to the verdict, whereas in this case the Court of Appeals held that the plaintiffs were not entitled to recover of the

defendant (petitioner) on the evidence adduced, saying, "upon the undisputed facts, the insurer was not liable as a matter of law." (R. 43). In the *Madden case* the District Judge excluded certain evidence which the appellate court held should have been admitted. Also the appellate court held that the District Judge erred in his charge to the jury. No such errors occurred in the *Fleniken* case. The petitioner contended that **as a matter of law** respondents were not entitled to recover on the insurance policy under the evidence adduced and this contention was upheld by the appellate court on its first hearing. (R. 5).

Roth vs. Hyer, 142 F. 2d 227, *supra,* was tried to the court without a jury. The plaintiff appealed from a judgment in defendant's favor. The Court of Appeal for the Fifth Circuit on the first appeal held that "The judgment was wrong and must be reversed for further and not inconsistent proceedings." (133 F. 2d 5, 9). The Court did not hold, however, that the District Judge should have directed verdict in favor of the mover as it held in this case. In the *Roth case* the appellate court recognized that it "could have made a final adjudication of the issue of liability on the record before it, and ordered that only the amount of damages be tried," but in the second appeal that Court said that it "did not do that, but reversed and annulled the only judgment there was and ordered further consistent proceedings." If the Appellate Court had merely reversed and remanded this case for further proceedings not inconsistent with its opinion instead of instructing the trial judge to direct verdict in favor of the defendant (petitioner), then we agree that the *Roth case* would be applicable, but in view of the foregoing we submit that the decision is not apropos.

In discussing motions under rule 50(b), it is stated in *Moore's Federal Practice*, 1943 Supp. to Vol. 3, page 97:

> "Undoubtedly where defendant has unsuccessfully moved for judgment n. o. v. after the adverse verdict, the appellate court has the right and duty, on finding the verdict unsupported, to order judgment n. o. v. or dismissal on the merits, rather than a new trial, and plaintiff is not thereby deprived of the right of jury trial."

In the footnotes the text writer cites *Brunet v. S. S. Kresge Co.*, 7th Cir., 115 F. (2) 713, cert. den. 61 S. Ct. 1102; *Great Northern Life Ins. Co. v. Vince*, 6th Cir., 118 F. (2d) 232, and *Brennan v. Baltimore & Ohio R. Co.*, 2d Cir., 115 F. (2d) 555, cert. den. 61 S. Ct. 614.

We submit that the recent decision of this Court in *Montgomery Ward and Co. v. Duncan*, 311 U. S. 243, 85 L. Ed. 147, construing rule 50(b) is peculiarly applicable. We quote:

> "**Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed.** The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."
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> "The rule contemplates that either party to the action is entitled to the trial judge's decision on both motions, if both are presented. A decision

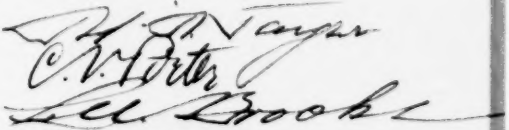
in favor of the moving party upon the motion for judgment ends the litigation and often makes it possible for an appellate court to dispose of the case without remanding it for a new trial."

(Emphasis ours.)

SUMMARY

In an effort to comply with rule 38 (2) of this Court requiring conciseness in the supporting brief, petitioner has not advanced all of the arguments which will be urged if this petition is granted. Petitioner believes and strongly urges that the Court of Appeals for the Fifth Circuit erred in reversing the judgment of the District Court in deciding that when the Fifth Circuit Court held that the petitioner's motion for a directed verdict should have been granted and remanded the case to the District Court for further proceedings not inconsistent with its opinion that this meant that "It was within the discretion of the court below to allow that motion to be renewed and to rule on it, but this should not have been done without giving the parties a hearing. The plaintiff was entitled to present his objections to such procedure and to ask for a trial *de novo*." (R. 44).

Respectfully submitted,



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